NANCY M. SWALLOW
A. DEAN MARTINEAU

IBLA 87-519, 87-520 Decided January 12, 1990

Appeals from decisions of the District Manager, Ely District, Nevada, Bureau of Land Management, rejecting desert land entry appli- cations. N-23159, N-23161.

Reversed and remanded.

1. Desert Land Entry: Applications--Desert Land Entry: Lands Subject to--Mining Claims: Location--Segregation

A decision rejecting a desert land entry application on the ground that the land is within an unpatented min- ing claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

APPEARANCES: Nancy M. Swallow and A. Dean Martineau, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Nancy M. Swallow and A. Dean Martineau (appellants) have appealed from separate decisions of the District Manager, Ely District, Nevada, Bureau of Land Management (BLM), dated April 28, 1987, rejecting their desert land entry applications, N-23159 and N-23161, because prior mining claims had been located on the land encompassed by their applications. In their statements of reasons for appeal, appellants challenge the propriety of the decisions on the basis that "[v]alid mining claims did not exist on the land * * * applied for under the Desert Land Entry Act," and that "the locator of the mining claims has had ample time since the filing of [their] Desert Land Entry Application[s] to protest such filing." Because these appeals present an identical question of law, we hereby consolidate them on our own motion.

On March 30, 1979, appellants filed desert land entry applications N-23159 and N-23161 with BLM pursuant to 43 U.S.C. § 321 (1982). Their

applications each encompassed 320 acres of land situated, respectively, in the N½ sec. 33, T. 14 N., R. 67 E., and the NE¼ sec. 5, T. 13 N., R. 67 E., and SE¼ sec. 32, T. 14 N., R. 67 E., Mount Diablo Meridian, White Pine County, Nevada. Because no desert land applications may be allowed until the land has been classified as suitable for such entry, BLM forwarded appellants' applications to the Ely District Office in 1982 for reports and recommendations that were necessary in determining whether the land should be classified as open to desert land entry. 1/

On October 25, 1985, BLM prepared a "Mineral in Character Report" with respect to 50 desert land entry applications filed for Spring Valley, Nevada, including the subject applications. In that report, at page 3, BLM noted that "[t]he county mining claim records and the BLM records indi-cate that several of the areas presently being considered for [desert land entries] are encumbered by mining claims." Specifically, BLM reported that the land encompassed by desert land entry applications N-23159 and N-23161 was subject to conflicting 160-acre association placer mining claims "located in 1968." Id. at 11. BLM identified the conflicting claims as the Kenn Nos. 50 and 52 placer mining claims (N MC 119609 and N MC 119611) in the case of application N-23159, and the Kenn Nos. 23 and 26 placer mining claims (N MC 119582 and N MC 119585) in the case of application N-23161. Finally, BLM recommended that the desert land entry applications in conflict with mining claims "not be allowed" not- withstanding its conclusion at page 10 of its report that the land encom- passed by the 50 desert land entry applications, including the subject applications, is "considered non-mineral in character for locatable min- erals." That report was acknowledged by the District Manager on October 30, 1985.

Before any action was taken with respect to appellants' applications or classification of the land at issue, an injunction prevented BLM from reclassifying the land. National Wildlife Federation v. Burford, 676 F. Supp. 271 (D.D.C. 1985), id. at 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), reh. denied, 844 F.2d 889 (D.C. Cir. 1988), case dis- missed; preliminary injunction vacated, 699 F.Supp. 327 (D.D.C. 1988); reversed and remanded, 878 F.2d 422 (D.C.Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3306 (U.S. Oct. 18, 1989) (No. 89-640). By separate

1/ Characteristics of land subject to disposition under the Desert Land Act are set forth in 43 CFR 2520.0-8. In Departmental regulation 43 CFR 2400.0-3(a), BLM notes that classification pursuant to 43 U.S.C § 315(f) (1982) is a prerequisite to approval of a desert land entry under 43 CFR Part 2520. Under 43 CFR 2521.2, an application must include a petition for classification unless the lands described in the application have been opened for disposition under the desert land laws. See generally 43 CFR Part 2450. This Board has affirmed the rejection of desert land appli- cations on the ground that the land had not been classified as suitable for entry. See Duella M. Adams, 70 IBLA 63 (1983).

letters dated August 11, 1986, BLM informed appellants of the injunction and advised each of them that "[s]ince there is no way to determine how long it will take to resolve this lawsuit, you may wish to consider withdrawing your application and reapplying when the land is reopened to application." Appellants, however, took no further action and left their applications pending.

However, BLM, evidently deciding not to await further developments with respect to the litigation, rejected appellants' applications on April 28, 1987, stating: "Regulations require that no desert land application will be allowed if filed on existing mining claims." BLM cited no regulation setting forth such a requirement, and, we can find none. Although the decision later cites 43 CFR 2520.0-8(a), BLM does not explain why that regulation requires rejection of appellants' appli- cations, although we note that for the land to be subject to entry, it must be "non-mineral" and "unappropriated." 43 CFR 2520.0-8(a)(1).

In Norma L. McBride, 73 IBLA 165 (1983), we affirmed the rejection of a desert land entry application as to land within a material site con- taining gravel, even though the applicant contended that the material site was not being used, because mineral lands are not subject to entry under 43 U.S.C. § 322 (1982). However, the mere fact of location of a mining claim does not establish the mineral character of the land. Elda Mining & Milling Co., 29 L.D. 279, 280-81 (1899); Magruder v. Oregon & California R.R. Co., 28 L.D. 174, 177 (1899). BLM itself does not recognize the land described by appellants' applications to be mineral in character, so appel-lants are not precluded from entering this land under the desert land law for this reason. See California v. Rodeffer, 75 I.D. 176, 179 (1968).

Accordingly, we conclude that this case raises the question solely of whether the location of a mining claim constitutes an appropriation of the land such that it thereby precludes the subsequent filing of a desert land entry application. We conclude that it does not.

[1] Longstanding Departmental precedent makes it clear that a min- ing claim segregates land from entry by others when a final certificate of mineral entry has been issued. See, e.g., Melvin Helit, 110 IBLA 144, 149-50 (1989); Scott Burnham, 100 IBLA 94, 110, 94 I.D. 429, 437 (1987); Elda Mining & Milling Co., supra. The importance of the final certifi- cate of entry was stressed in the Helit case, inasmuch as the Board acknowledged that when the final certificate with respect to some of the claims was withdrawn in that case, it was possible to initiate an adverse interest against those claims for which the final certificate was no longer in effect, notwithstanding the fact that the subsisting location remained in effect. Id. at 151.

The Elda Mining decision more directly illustrates the Department's practice in situations such as the one on appeal. In that case, a homestead

entry was made on lands that were subject to an unpatented mining claim. Even though the location of the mining claim preceded the homestead entry, no segregative effect was attributed to the location of the mining claim, per se. The homestead entry was not canceled as having been improperly allowed; rather, it was recognized as the prior entry of record. A hearing was ordered on the question of whether the claimed lands were "mineral in character" and, thus, unavailable for homestead entry. 29 L.D. at 281.

Even though in Helit and Burnham we attributed segregative effect to a final certificate, we also recognized, in accordance with the Supreme Court's decision in Belk v. Meagher, 104 U.S. 279 (1881), that an unpatented mining claim will be deemed to segregate the land encompassed by the claim "from the acquisition of competing rights" where it constitutes a valid claim, but not where it constitutes an invalid claim. Scott Burnham, 100 IBLA at 107, 94 I.D. at 436; see also Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337, 353 (1905). Thus, if the locator of a prior mining claim which is not an entry of record can carry the burden of proving the validity of his claim against a nonmineral entry of record, his claim will be deemed to have segregated the land from entry by the nonmineral entryman. As the Court stated in St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 655 (1898): "Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." Such segregation amounts to an appropriation of public land to private use so far as subsequent competing entries by others. Stenfjeld v. Espe, 171 F. 825, 828 (9th Cir. 1909); Erwin v. Perego, 93 F. 608, 611 (8th Cir. 1899).

In the present case, the record shows that BLM regards the subject placer mining claims as invalid, because as noted above, BLM has concluded that the land encompassed by the claims is not mineral in character. Cameron v. United States, 252 U.S. 450, 456 (1920); United States v. Lara, 67 IBLA 48, 50, 52-53 (1982), aff'd, United States v. Lara (On Reconsideration), 80 IBLA 215 (1984), aff'd, Lara v. Secretary of the Interior, No. 84-1272-PA (D. Or. Apr. 30, 1986), aff'd, Lara v. Secretary of the Interior, 820 F.2d 1535 (9th Cir. 1987). As the Board stated in Burnham, "[a] valid location does not need a rule giving segregative effect to a patent application to defeat rival locations and an invalid claim does not deserve such protection." 100 IBLA at 108-09. In this case BLM has attempted to extend a segregative effect to a mere unpatented claim, which, it has reason to know, does not deserve such protection.

BLM's decision must, therefore, be reversed. On remand, BLM may take what action it deems appropriate with respect to the classification of the subject land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions

appealed from are reversed and the cases remanded for further action con- sistent with this opinion.

James L. Byrnes
Administrative Judge

I concur:

David L. Hughes
Administrative Judge